

FCC MAIL SECTION

Federal Communications Commission

FCC 98-182

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Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY

In the Matter of)	
)	WT Docket No. 96-199
Amendment of Part 90 Concerning the)	
Commission's Finder's Preference Rules)	

REPORT AND ORDER**Adopted: July 29, 1998****Released: August 7, 1998**

By the Commission:

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. By this *Report and Order*, we amend Part 90 of our Rules to eliminate the finder's preference program¹ in the 220-222 MHz band and in the 470-512 MHz, 800 MHz, and 900 MHz Private Land Mobile Radio (PLMR) bands. Our primary goal in this proceeding is to facilitate the successful implementation of a geographic licensing approach for the 220-222 MHz band by eliminating one of the vestiges of the prior licensing framework, namely, the finder's preference program. We have also used the instant proceeding to examine the benefits, if any, associated with maintaining the finder's preference program in the 470-512 MHz, 800 MHz, and 900 MHz PLMR bands. Based upon examination of the record in this proceeding, we conclude that the regulatory purposes underlying creation of the finder's preference program would no longer be served by continuing the program in the subject PLMR bands, that the administrative resources necessary to sustain the finder's preference program are better dedicated to other Commission channel recovery efforts and that the actions we take herein are consistent with our expanded auction authority. Thus, we believe that the public interest is best served by complete elimination of the finder's preference program.

2. Accordingly, as of the adoption date of this *Report and Order*, we will not accept new finder's preference requests in the 220-222 MHz band or for 470-512 MHz, 800 and 900 MHz² PLMR spectrum.

¹ See 47 C.F.R. § 90.173(k). A finder's preference is granted to persons who present the Commission with information that may lead to a channel recovery. This information may be a demonstration that an existing licensee has failed to construct, discontinued operation, or otherwise violated Commission rules. If the information provided by the finder proves to be correct, the finder achieves a dispositive preference for the recovered channel and its application is granted.

² Note that in this proceeding only the 800 MHz and 900 MHz PLMR bands are at issue. The finder's preference has been abolished in the 800 MHz and 900 MHz SMR bands and, in any event, initial license applications are not accepted for these SMR bands, which are licensed on a geographical area basis. See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, Implementation of Sections 309(j) of the Communications Act -- Competitive Bidding, PR Docket No. 93-144, PP Docket 92-253, *First Report and Order*, *Eighth Report and Order* and *Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463, 1501, 1634 (1995) (800 MHz Eighth Order). See also Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service; Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding,

We will process only those finder's preference requests pending on the date of adoption of this *Report and Order*. Our decision to process pending finder's preference requests is grounded, *inter alia*, on the relatively small number of such pending requests.

II. BACKGROUND

3. The Commission established the finder's preference program in response to suggestions from industry groups that the program would be a useful vehicle for recovering fallow spectrum. The industry groups recommended that the Commission give a preference to an eligible licensee which brought to the Commission's attention a station which had not met the Commission's construction, loading or operational rules. Specifically, they proposed that persons with information that might lead to a channel recovery would file that information with the Commission, identifying the licensee and the alleged rule violation or violations. If the Commission determined that there had been a material rule violation by the "target" licensee, the "finder's" application would be granted and the "target" station would have to relinquish the frequency. This procedure was implemented in the hope that it would maximize utilization of scarce frequencies by giving unused or underused channels to those who actually needed them.³

4. In the *Notice of Proposed Rule Making* in this proceeding, the Commission proposed to eliminate the finder's preference program in the 220-222 MHz band.⁴ We stated that continuation of the program likely would be incompatible with our proposals in PR Docket No. 89-552 to implement geographic licensing⁵ in this band and to use competitive bidding to choose among mutually exclusive applications.⁶ In addition to proposing elimination of the finder's preference in the 220-222 MHz band, the Commission sought comment on: (i) whether there was a continued need for the finder's preference in the 470-512 MHz, 800 MHz, and 900 MHz PLMR bands; and (ii) whether the Commission should

220-222 MHz, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 188 (1995) (*Third Notice*).

³ See Amendment of Part 90 of the Commission's Rules Concerning the Construction, Licensing and Operation of Private Land Mobile Radio Stations, PR Docket No. 90-481, *Notice of Proposed Rule Making*, 5 FCC Rcd 6401, 6403-05 (1990).

⁴ Amendment of Part 90 Concerning the Commission's Finder's Preference Rules, WT Docket No. 96-199, *Notice of Proposed Rule Making*, 11 FCC Rcd 13016-17 (1996) (*Notice*).

⁵ Geographic licensing entails an applicant applying for authority to serve a defined geographical area, for example a Basic Trading Area as defined in Rand McNally's Commercial Atlas and Marketing Guide. The applicant granted the license to serve the defined area may locate transmission facilities anywhere therein, limited only by interference considerations with respect to facilities in contiguous geographical areas and considerations affecting aircraft safety. The geographic area licensing scheme is an alternative to site-based licensing in which a prospective licensee applies for transmission facilities at specifically designated locations.

⁶ See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service; Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 188 (1995) (*Third Notice*).

dismiss pending finder's preference requests if the finder's preference program is eliminated.⁷ The Commission received 64 comments and 6 reply comments in response to the *Notice*.⁸

III. DISCUSSION

A. Elimination of the Finder's Preference in the 220-222 MHz Band

5. After review of the record in this proceeding, we conclude that the finder's preference should be eliminated in the 220-222 MHz band. As an initial matter, we note that this action is consistent with the Commission's decisions regarding other bands where it has transitioned from site-specific to geographic area licensing and adopted competitive bidding procedures to select between mutually exclusive applications.⁹ We believe that giving geographic licensees exclusive right to recovered channels will increase their ability to provide uniform service throughout their license areas, an outcome consistent with our overall geographic licensing goal of maximizing service to the public throughout the licensed geographic area. Thus, geographic licensees would not be required to compete with prospective "finders" for spectrum that is recaptured after already acquiring a license for a larger geographic area or spectrum block. Moreover, we agree with Airtouch Paging and Nationwide Paging, Inc. (Airtouch), who contend, in their joint comments, that the finder's preference program in the 220-222 MHz band should be discontinued because, otherwise, Commercial Mobile Radio Service (CMRS) licensees in this band would be saddled with a disadvantage not found in other subscriber-based services: the need to deal with potential coverage limitations caused by channels licensed to "finders." As Airtouch observes, this would be contrary to the Commission's goal of regulatory symmetry among CMRS licensees.¹⁰

6. Our decision in this regard is bolstered by the fact that no commenting party opposed prospective termination of the finder's preference on the frequencies allocated for 220-222 MHz geographic area licenses. In fact, SMR Advisory Group, L.C. (SMR Advisory) claims that retention of the finder's preference program would result in certain costs to the public.¹¹ Costs would be incurred, SMR Advisory avers, because the pendency of finder's preference requests would create uncertainty among potential geographic area bidders about their ability to achieve wide-area coverage, thereby

⁷ *Notice*, 11 FCC Rcd at 13021.

⁸ See Appendix B hereto. Of the 64 comments received, 43 were substantially identical filings from parties which have pending finder's preference requests. These "form" comments are identified with an asterisk in Appendix B.

⁹ See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Service Radio Pool, PR Docket No. 89-553, PP Docket No. 93-253, GN Docket No. 03-252, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639 (1995) (900 MHz Seventh Order); See also 800 MHz Eighth Order.

¹⁰ Airtouch Comments at 5, citing Revision of Part 22 of the Commission's Rules to Facilitate Future Development of Paging Systems, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, WT Docket No. 96-18, PP Docket No. 93-253, *Notice of Proposed Rulemaking*, 11 FCC Rcd 3108 (1996).

¹¹ See SMR Advisory Comments at 5.

reducing the perceived value of the spectrum.¹² Similarly, the Industrial Telecommunications Association, Inc. (ITA) argues that retention of the finder's preference program would be "counterproductive in an environment where the FCC expects to give wide-area licensees broad authority to implement stations over a geographic area."¹³ We find these arguments persuasive. For all of the reasons mentioned above, we conclude that elimination of the finder's preference in the 220-222 MHz band is in the public interest.

B. Elimination of the Finder's Preference in the 470-512 MHz, 800 MHz, and 900 MHz Bands

7. In the *Notice*, the Commission questioned the continued need for the finder's preference program in the 470-512 MHz, 800 MHz, and 900 MHz PLMR bands, especially when these bands have been subject to relatively few finder's preference requests.¹⁴ Following review of the comments received in this proceeding and an independent staff analysis of historical data regarding the finder's preference program, we conclude that the reasons which initially justified implementation of the program no longer support its continuation. When the finder's preference program was established, the Commission envisioned that it would be a useful adjunct to our ongoing compliance review activities and would facilitate expeditious and efficient reassignment of unused frequencies to persons who would use them effectively.¹⁵ Experience has taught otherwise. Even commenting parties who urge retention of the finder's preference program in some form concede that the program has been rife with problems.¹⁶ Rather than expediting identification and recovery of unused channels, the finder's preference program has often led to protracted adversarial proceedings involving the "finder" and the licensee of the target station,¹⁷ which require dedication of considerable Commission staff resources.¹⁸ As a result, we disagree with the contentions of Motorola, PCIA and the American Mobile Telecommunications Association, Inc. (AMTA) that, despite its acknowledged problems, the finder's preference program has been effective in these and other bands.¹⁹

8. We also decline to implement commenters' suggestions for refinements to our finder's preference program, which are aimed at increasing the program's overall effectiveness.²⁰ In this

¹² *Id.*

¹³ ITA Comments at 3.

¹⁴ *Notice*, 11 FCC Rcd at 13021.

¹⁵ *Id.* at 13019.

¹⁶ Motorola notes that, "in the commercial context, [the finder's preference program] was plagued by non-meritorious and speculative filings." Motorola Comments at 5-6; PCIA notes that over 100 preference requests were filed based on "some minor discrepancy in transmitter coordinates" and thus were frivolous. PCIA Comments at 4-5 and n. 6. *See also* Nextel Comments at 4-5

¹⁷ *See* Motorola Comments at 5-6; Nextel Comments at 4-5; PCIA Comments at 5; SMR WON Comments at 2-4.

¹⁸ *See* ITA Comments at 9; Robert Kelty, Mobile Radio Consultant (Kelty), Comments at 3.

¹⁹ *See* Motorola Comments at 1, 4-7; PCIA Comments at 2-4; AMTA Reply Comments at 4-5.

²⁰ *See* PCIA Comments at 5; SMR WON Comments at 2-4; ITA Comments at 9; Kelty Comments at 3.

connection, we agree with AMTA that it would be inappropriate to delegate the processing of finder's preference requests to certified frequency coordinators.²¹ We do not believe that processing of such requests is a matter within the specific expertise of frequency coordinators whose principal role is conducting interference analyses to assist applicants in the identification of suitable channels. We also believe that the suggested delegation would involve yet an additional administrative burden to the extent that the Commission would have to review, *de novo*, contested requests that had been decided by coordinators.²²

9. In addition, we disagree with those commenters who argue that our ongoing oversight and compliance review initiatives will not sufficiently provide for recovery of unused channels.²³ As the Commission indicated previously, over 1,400 finder's preference requests were filed between the time the program was inaugurated in 1991 to the date of the *Notice* in 1996.²⁴ At that time, 900 requests had been processed, and 369 of those 900 requests had been granted. Moreover, almost 80 percent of the granted requests were for SMR channels. Further Commission staff analysis of the finder's preference historical data indicates that, as of January, 1998, only 50 additional finder's preference requests for channels in the 470-512 MHz, 800 MHz and 900 MHz PLMR bands have been filed since adoption of the *Notice*. By comparison, our compliance review efforts have resulted in recovery of 142 channels in 1996 and over 345 additional channels in 1997. Thus, we conclude that our channel recovery efforts, independent of the finder's preference program, have been highly effective in recent years. Our increasing success in this area, combined with the apparent decline in the filing of, and need for, finder's preference requests and the inefficiencies inherent in protracted adversarial proceedings involving finder's preference requests, lead us to conclude that the public interest would be best served by elimination of the program in the 470-512 MHz, 800 MHz and 900 MHz PLMR bands.

10. Finally, we believe that retention of the finder's preference program is unnecessary, indeed counterproductive. We believe that a "finder" who captures a channel or channels will not necessarily make optimum use of the captured spectrum. In the typical case, a finder's preference target can be identified with relative ease and for only a nominal investment. Thus we believe that it is often the mere availability of spectrum, rather than an identified need therefor, that drives the filing of a finder's preference request.

11. In sum, for the reasons discussed *supra*, we hereby terminate the finder's preference program for the 220-222 MHz, 470-512 MHz, and 800 MHz and 900 MHz PLMR bands. Finder's preference requests will no longer be accepted upon the adoption of this *Report and Order*. This action is procedural in nature, obviating the need to wait 30 days after publication of this *Report and Order* in the Federal

²¹ See AMTA Reply Comments at 4, n.4.

²² Cf. 47 CFR § 90.175 allowing disaffected parties to seek Commission review of contested frequency coordinations.

²³ See ITA Comments at 5; PCIA Comments at 2.

²⁴ *Notice*, 11 FCC Rcd at 13019.

Register to halt such unacceptable filings.²⁵ In addition, for the reasons set forth in this paragraph, we find that good cause exists for making this action effective on adoption of this *Report and Order*.²⁶

C. Processing of Pending Finder's Preference Requests

12. In the *Notice*, the Commission proposed to reserve the discretion to dismiss pending finder's preference requests if the finder's preference program were eliminated.²⁷ We will not adopt that approach but, rather, we will process those finder's preference requests that are pending as of the adoption date of this *Report and Order*.²⁸ Our decision is based upon the numerous supporting comments we have received, the fact that there are only a small number of pending finder's preference requests in the affected bands, and our treatment of pending finder's preference requests following the elimination of the finder's preference program in the 800 MHz and 900 MHz SMR bands.

13. We believe that, because there are relatively few pending finder's preference requests,²⁹ processing these pending requests will not exact a significant burden on our administrative resources. We also note that only one finder's preference request has been filed in the 220 MHz SMR band and, therefore, there will be minimal or no impact on the forthcoming auction for geographic area licenses in that band if we process that request.

14. Further, we note that following the elimination of the finder's preference program in the CMRS 800 MHz and 900 MHz SMR bands, we continued to process finder's preference requests that were pending as of the adoption dates of those actions. We find no reason why the outcome should be any different for those pending finder's preference requests in the 220 MHz SMR, 470-512 MHz, and 800 MHz and 900 MHz PLMR bands. Therefore, in the interest of regulatory symmetry, we will process finder's preference requests that are pending as of the adoption date of this *Report and Order*.

15. Our decision to process pending finder's preference requests comports with the outcome urged in the multiple comments received from parties with pending finder's preference requests.³⁰ We have considered, but reject, the argument put forth by Nextel that pending finder's preference requests should

²⁵ See § 553(d)(1) of the Administrative Procedure Act, 5 U.S.C. § 553(d)(1), which, by its express terms, is applicable only to substantive rules. See also *800 MHz Eighth Order*, 11 FCC Rcd at 1501, 1634; *900 MHz Seventh Order*, 11 FCC Rcd at 2658-59 wherein the finder's preference program for the 800 MHz and 900 MHz SMR bands was discontinued effective on the adoption date of the respective orders terminating the program in those bands.

²⁶ See § 553(d)(3) of the Administrative Procedure Act, 47 U.S.C. § 553(d)(3), which permits an agency to make a rule effective sooner than 30 days after publication, "for good cause shown and published with the rule."

²⁷ *Notice*, 11 FCC Rcd at 13021.

²⁸ We will also consider petitions for reconsideration and applications for review of prior finder's preference decisions and take whatever action is necessary in those cases.

²⁹ As of July 29, 1998, there were only 76 unresolved finder's preference requests pending.

³⁰ See, e.g., Comments of Kathleen M. Allen, Robert H. Allen, Steven W. Allen, Randall G. Atkinson, John C. Barker, Glen Campbell, James A. Cassell, Sandra M. Cassidy, Janet Carol Castanias, *et al.* designated with an asterisk in Appendix B hereto.

be dismissed because they target "legitimate operating entities."³¹ There is no evidence offered by Nextel that all finder's preference requests fall in that category. In any event, the bare claim that any given targeted licensee is "legitimate" (*i.e.*, has conformed to the Commission's Rules) is conclusory at best. The "legitimacy" of target licensees is the very issue that will be resolved through the processing of the finder's preference requests.

IV. CONCLUSION

16. We find that elimination of the finder's preference program in the 220-222 MHz band and in the 470-512 MHz, 800 MHz, and 900 MHz PLMR bands is in the public interest. After careful consideration of the record in this proceeding, review of recent data on the efficacy of the Commission's channel recovery program and assessment of the 1997 Budget Act's provisions concerning competitive bidding, we have decided to adopt our proposal to discontinue the finder's preference program in the 220-222 MHz band. We also eliminate the finder's preference program in the 470-512 MHz, 800 MHz, and 900 MHz PLMR bands because we find that the program has outlived its utility, that the Commission's ongoing oversight and compliance review programs are adequate enforcement mechanisms for channel recovery, where needed, in the subject bands, and that the resources necessary to administer the finder's preference program are better deployed in support of other Commission channel recovery efforts. We nonetheless will process pending finder's preference requests for the referenced bands as of the adoption date of this *Report and Order*. Effective with the adoption of this *Report and Order*, no further finder's preference requests will be accepted in the 220-222 MHz band or the 470-512 MHz, 800 MHz and 900 MHz PLMR bands.

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

17. Appendix C contains a Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. Section 604, with respect to this *Report and Order*.

B. Ordering Clauses

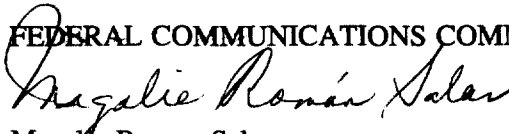
18. In view of the foregoing and pursuant to the authority contained in Sections 4, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303 and 307 IT IS ORDERED that Part 90 of the Commission's Rules IS AMENDED as specified in Appendix A, 30 days after publication of this *Report and Order* in the Federal Register.

19. IT IS FURTHER ORDERED that effective upon adoption of this *Report and Order*, no additional finder's preference requests for the 220-222 MHz band or the 470-512 MHz, 800 MHz, and 900 MHz PLMR bands will be accepted for filing.

³¹ See Nextel Comments at 7.

C. Contact for Information

20. For further information, contact Michael J. Wilhelm of the Policy and Rules Branch of the Public Safety and Private Wireless Division, Wireless Telecommunications Bureau at (202) 418-0680 or via e-mail to "mwilhelm@fcc.gov".

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations, is amended as follows:

Part 90-PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 will continue to read as follows:

AUTHORITY: Secs. 4, 251-2, 303, 309, and 332, 48 Stat. 1066, 1082, as amended: 47 U.S.C. §§ 154, 251-2, 303, 309, and 332, unless otherwise noted.

2. Paragraph (k) of Section 90.173 is deleted and in its place is substituted:

Sec. 90.173 Policies Governing the Assignment of Frequencies

* * *

(k) This paragraph is only applicable to entities with Finder's Preference requests pending before the Commission as of July 29, 1998. Notwithstanding any other provisions of this part, any eligible person shall be given a dispositive preference for a channel assignment on an exclusive basis in the 220-222 MHz, 470-512 MHz, and 800/900 MHz (except on frequencies designated exclusively for SMR service) bands by submitting information that leads to the recovery of channels in these bands. Recovery of such channels must result from information provided regarding the failure of existing licensees to comply with the provisions of §§ 90.155, 90.157, 90.629, 90.631 (e) or (f), or 90.633 (c) or (d).

3. Paragraph (i)(15) of Section 90.175 of the Rules is deleted in its entirety.
4. Paragraph (n)(7) of Section 1.1102 of the Rules is deleted in its entirety.

APPENDIX B
LIST OF PARTIES FILING COMMENTS
AND REPLY COMMENTS

COMMENTS:

1. Advanced Electronics, Inc.
2. AirTouch Paging and Nationwide
Paging, Inc.
3. Kathleen M. Allen*
4. Robert H. Allen*
5. Steven W. Allen*
6. Randall G. Atkinson*
7. John C. Barker*
8. Bruce Bryant
9. Edward S. Butler
10. Glen Campbell*
11. Kenneth Carlson, Rosemary Coyle
and JKR Partnership
12. James A. Cassell*
13. Sandra M. Cassidy*
14. Janet Carol Castanias*
15. Richard Castanias*
16. Patrick E. Connelly*
17. Shirley Ann Dennis*
18. Laura Lee Fairbanks*
19. Christopher A. Feilen*
20. Mary C. Feilen*
21. Robert D. Feilen*
22. Cathy Fougnyes*
23. Chris Garrett*
24. Alan M. Hansel*
25. Angela N. Harris*
26. Ray C. Heffron*
27. David E. Huffman*
28. John R. Hugenberg*
29. Gregory K. Hurst*
30. Incom Communications
Corporation and Narrowband
Network Systems
31. Industrial Telecommunications
Associates, Inc.
32. J & M Paging, Inc.
33. Cynthia Kaufman*
34. Kelley Communications, Inc.
35. David M. Kelley*
36. William Robert Kelley*
37. Gary Levey*
38. Fred B. Lott*
39. Tracy Manford*

40. Linda Marler*
41. Daniel T. Meek*
42. Gwyn J. Mitchell
43. Mobile Communications
Service of Miami, Inc.
44. Mobile Radio Resources, Inc.
45. Cherie R. Morgan*
46. Motorola, Inc.
47. National Science & Technology,
Henry Radio, Inc.
48. Neches Communications, Inc.
49. Nextel Communications, Inc.
50. George Nitecki*
51. Stephen Orr*
52. Susan Palmer*
53. Patrick Electronics, Inc.
54. Personal Communications
Industry Association
55. Joy Rheins*
56. John M. Roeder*
57. Charles Russell, Jr.*
58. Linda Sue Schafer*
59. Robin R. Settles*
60. SMR Advisory Group, L.C.
61. SMR WON
62. Telecom Corporation
63. Lawrence E. Vaughn, Jr.*
64. Brian Wright*

REPLY COMMENTS:

1. Airtouch Paging and Nationwide
Paging, Inc.
2. American Mobile
Telecommunications Association,
Inc.
3. Bay Electronics, Inc.
4. Industrial Telecommunications
Association, Inc.
5. Personal Communications Industry
Association
6. Securicor Radiocom, Limited

* indicates comments with substantially the same content.

APPENDIX C

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making* in WT Docket No. 96-199.³² The Commission sought written public comments on the proposals in the *Notice*, including comments on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Report and Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.³³

I. Need For and Objective of the Proposed Rule

In the *Notice*, as our objectives, we proposed to amend Part 90 of our Rules to eliminate the finder's preference program in the 220-222 MHz band because we had proposed competitive bidding and geographic licensing for this band. The *Notice* also sought comment on (1) whether the finder's preference program should be continued for Private Land Mobile Radio (PLMR) services in the 470-512 MHz, 800 MHz, and 900 MHz bands because these bands had few, if any, finder's preference requests, (2) whether the Commission should delay processing finder's preference requests in the 220-222 MHz band, (3) whether the Commission should retain the discretion to dismiss pending finder's preference requests in any frequency band in which the finder's preference is eliminated, and (4) whether ongoing oversight and compliance review programs are adequate enforcement mechanisms so as to justify the elimination of the finder's preference program.

In this *Report and Order*, we find that elimination of the finder's preference program in the 220-222 MHz, 470-512 MHz, 800 MHz, and 900 MHz bands is appropriate. Pending finder's preference requests will be processed in accordance with Commission's rules.

II. Summary of Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

No comments were submitted in direct response to the IRFA. We have, however, reviewed general comments that may impact small businesses.

The only impact on small business from this *Report and Order* is the elimination of the finder's preference program and filings related thereto in the 220-222 MHz, 470-512 MHz, 800 MHz, and 900 MHz bands. To date, only one finder's preference request has been filed in the 220-222 MHz band. The elimination of the finder's preference program in the 220-222 MHz band is predicated on the fact that

³² Amendment of Part 90 Concerning the Commission's Finder's Preference Rules, *Notice of Proposed Rule Making*, WT Docket No. 96-199, 11 FCC Rcd 13016 (1996) (*Notice*).

³³ Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), *codified at* 5 U.S.C. § 601 *et seq.*

geographic area licensing and competitive bidding have been adopted for this band.³⁴ The competitive bidding and geographic area licensing framework has been designed to implement Congress's goal of giving small business and others the opportunity to participate in the provision of spectrum-based services in accordance with 47 U.S.C. § 309(j)(4)(D). We eliminated the finder's preference program in the 800 MHz and 900 MHz bands when we adopted geographic area licensing and competitive bidding in those bands.³⁵ Therefore, this *Report and Order* -- which eliminates the finder's preference program in the 220-222 MHz band -- is consistent with our objective to promote efficient licensing and enhance the competitive potential of the 220-222 MHz band and is in accordance with the statutory directives of Section 309(j)(4)(D) of the Communications Act. We believe that the Commission's ongoing oversight and compliance programs are adequate and that the few number of finder's preference requests filed overall justify the elimination of the finder's preference program not only in the 220-222 MHz band, but also in the 470-512 MHz, 800 MHz, and 900 MHz bands.

III. Description and Estimate of the Number of Small Entities Affected by the Subject Rules.

The rules adopted in this *Report and Order* will require small businesses that desire spectrum in the 220-222 MHz band to participate in the geographic area licensing and competitive bidding process, with the exception of certain channels allocated to Public Safety and Special Emergency Radio Services (SERS) that are not subject to geographic area licensing. The process has been designed to enable small businesses to compete for spectrum. In the 470-512 MHz, 800 MHz, and 900 MHz PLMR band services, as well as on those 220-222 MHz channels allocated to Public Safety and SERS, small businesses may obtain channels in accordance with the Commission's licensing rules for those bands.

The PLMR service plays an essential role in a vast range of industrial, business, land transportation, and public safety activities. PLMR systems are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed nor would it be possible to develop a definition of small entities specifically applicable to PLMR users. For the purpose of determining whether a licensee is a small business as defined by the Small Business Administration (SBA), each licensee would need to be evaluated within its own business area.

³⁴ See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-522, Implementation of Sections 3(n) and 332 of the Communications Act--Regulatory Treatment of Mobile Services, GN Docket No. 93-252, and Implementation of Section 309(j) of the Communications Act--Competitive Bidding, 220-222 MHz, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, PP Docket No. 93-253, 11 FCC Rcd 188 (1995).

³⁵ Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels in the Designated Filing Areas in the 896-901 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, Implementation of Section 309(j) of the Communications Act--Competitive Bidding, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 (1995).

The *Notice* requested comment on the number of small entities that use PLMR for their internal communications needs in the 220-222 MHz, 470-512 MHz, 800 MHz, and 900 MHz bands and on the number of small entities that are likely to file finder's preference requests to obtain spectrum for their own internal communications needs. No comments were received. Therefore, the Commission is unable at this time to determine the number of small businesses which could be impacted by the amended rules. However, the Commission's fiscal year 1994 annual report indicates that at the end of fiscal year 1994, there were 1,101,711 licensees operating 12,882,623 transmitters in the PLMR bands below 512 MHz. There are also significant numbers of licensees in PLMR above 512 MHz.

The RFA also includes small governmental entities as part of the regulatory flexibility analysis.³⁶ The definition of small governmental entity is one with a population of less than 50,000.³⁷ There are over 85,006 governmental entities in the nation.³⁸ This number includes such entities as states, counties, cities, utility districts, and school districts. There are no figures available on what portion of this number has populations fewer than 50,000. This number, however, includes 38,978 counties, cities, and towns, and of those 37,566, or 96 percent, have populations fewer than 50,000.³⁹ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities.⁴⁰ Thus, of the 85,006 governmental entities, we estimate that 96 percent, or 81,600 are small entities that may be affected by our rules.

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rules

This *Report and Order* eliminates the finder's preference program in the 220-222 MHz, 470-512 MHz, 800 MHz, and 900 MHz PLMR bands. The administrative requirements and related costs for filing such finder's preference requests are eliminated. Therefore, no new requirements are imposed by this action.

V. Steps Taken By Agency to Minimize Significant Economic Impact on Small Entities Consistent with Stated Objectives

This *Report and Order* eliminates the finder's preference program in the 220-222 MHz band because we have adopted geographic area licensing and competitive bidding in this band. The competitive bidding and geographic area licensing framework has been designed to implement Congress' goal of providing small businesses and others the opportunity to participate in the provision of spectrum-based

³⁶ See 5 U.S.C. § 601(5) (including cities, counties, towns, townships, villages, school districts, or special districts).

³⁷ *Id.*

³⁸ 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

³⁹ *Id.*

⁴⁰ *Id.*

services in accordance with 47 U.S.C. § 309(j)(4)(D). We eliminated the finder's preference program in the 800 MHz and 900 MHz SMR bands when we adopted geographic area licensing and competitive bidding. Therefore, the *Report and Order* is consistent with our objective to promote efficient licensing and enhancement of the competitive potential of the 220-222 MHz band and is in accordance with the statutory directives of Section 309(j)(4)(D) of the Communications Act. The elimination of the finder's preference program in the 470-512 MHz, 800 MHz, and 900 MHz PLMR bands should not affect small businesses because the Commission's ongoing oversight and compliance programs are adequate to insure that unused spectrum is returned and re-assigned efficiently. Additionally, any returned channels in these bands may be applied for by PLMR providers, which are primarily small businesses.

VI. Report to Congress

The Commission will send a copy of this Final Regulatory Flexibility Analysis along with the Report and Order, in a report to Congress pursuant to the SBREFA.⁴¹ A copy of this FRFA will also be published in the Federal Register.

⁴¹ See 5 U.S.C. § 801(a)(1)(A).